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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

## Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities

GEN Docket No. 00-185

TO: The Commission

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## **TABLE OF CONTENTS**

SUMMARY.....	ii
I. THE COMMISSION SHOULD ADOPT OPEN ACCESS REQUIREMENTS THAT PROHIBIT DISCRIMINATION AGAINST ANY UNAFFILIATED CONTENT OR SERVICE PROVIDER.....	3
A. Open Access Requirements Are Needed To Prevent Cable Operators From Discriminating Against Independent Content and Service Providers.....	3
B. The Commission's Model For Open Access Should Broadly Prohibit Discrimination Against Unaffiliated Content And Service Providers, Including Broadcasters.....	7
II. OPEN ACCESS REQUIREMENTS SHOULD APPLY TO ENTITIES THAT SERVE AS GATEKEEPERS TO CONSUMERS' HOMES. ....	10
III. CONCLUSION.....	12

## SUMMARY

The Commission states that through this inquiry it “seek[s] to create a legal and policy framework for cable modem service and the cable modem platform that will foster competitive deployment of new technologies and services by all entities, including cable operators and Internet service providers (ISPs) alike.” MSTV strongly supports the Commission’s efforts. However, we believe that if the Commission truly wishes to foster competitive deployment of new technologies and services by *all* entities, it must adopt an approach to open access that ensures consumer access not only to ISPs, but also to other independent content and service providers easily blocked, buried, or diminished by a cable or other gatekeeper.

The advent of digital technology should benefit consumers by offering them an expansive array of innovative content and services, including interactive electronic program guides, interactive television programming, and other broadcast-delivered services. As history shows, vertically-integrated gatekeepers such as cable operators can and will use their bottleneck control over the flow of information into the home in order to favor their own affiliated content and services over those produced by unaffiliated entities. Without open access requirements that ensure nondiscriminatory treatment of such content and services by cable operators and other gatekeepers, consumers could be deprived of the abundant benefits that the digital transition was intended to create. To foster the development of valuable new content and services and to protect the public’s access thereto, the Commission should propose open access requirements that prohibit discrimination against all unaffiliated providers of content and services, including ISPs, broadcasters, and other entities.

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Inquiry Concerning High-Speed	)	
Access to the Internet Over Cable	)	GEN Docket No. 00-185
and Other Facilities	)	
	)	

TO: The Commission

**COMMENTS OF  
THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.**

The Association for Maximum Service Television, Inc. ("MSTV")<sup>1</sup> submits these comments to the Commission's Notice of Inquiry ("NOI") in the above-captioned proceeding.<sup>2</sup> MSTV strongly supports the concept of "open access" but believes that the Commission has taken an overly narrow view of this concept. MSTV submits these comments to stress that the "open access" concept should not be restricted to high-speed Internet access services, but should extend to other content and services delivered over the cable platform, including electronic

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<sup>1</sup> MSTV represents more than 400 local television stations before the FCC and Congress on technical and technology issues relating to analog and digital television services. It has frequently commented on the need for the Commission to ensure that DTV signals can pass undegraded through the cable plant to the consumer. *See, e.g.,* Comments of the Association for Maximum Service Television, Inc., *Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120 (Oct. 13, 1998) ("*MSTV DTV Carriage Comments*"); Reply Comments of the Association for Maximum Service Television, Inc., *Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120 (Dec. 22, 1998) ("*MSTV DTV Carriage Reply*"); Joint Broadcasters Comments, *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MM Docket No. 00-39 (May 17, 2000) ("*Broadcasters Biennial Review Comments*").

program guides (“EPGs”) and digital and interactive television programming and services. Cable operators’ willingness to wield bottleneck control to eliminate competition to their own content and services is well-documented and strongly supports adoption of open access requirements that prohibit cable operators from discriminating against ISPs *and* other unaffiliated service and content providers.<sup>3</sup>

In the *NOI*, the Commission not only inquires about cable open access requirements, but also “seeks to develop a record that examines the full range of high-speed service providers, including providers that use cable, wireline, satellite, broadcast, and unlicensed spectrum technologies.”<sup>4</sup> As the Commission considers the extent to which open access requirements should apply to these other technologies, it should keep in mind the basic characteristic that makes open access requirements necessary – the possession of “gatekeeper” control to the consumer’s home. Specifically, open access requirements are necessary where a single entity exercises effective control over the programming and services that reach a consumer’s home, thus acting as a “gatekeeper” to that home.<sup>5</sup> This control, exercised through the use of proprietary equipment and access points and high switching costs, is most obvious in the cable context, but it is growing for other multichannel video program distributors (“MVPDs”). When coupled with increasing vertical integration between MVPDs and content providers, this gatekeeper control represents a powerful tool that may be used to deny the public

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<sup>2</sup> Notice of Inquiry, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GEN Docket No. 00-185 (rel. Sept. 28, 2000) (“*NOI*”).

<sup>3</sup> See footnote 16 below.

<sup>4</sup> See *NOI* at ¶ 3.

access to content and services offered by sources unaffiliated with the MVPD. When gatekeeper power and vertical integration is further combined with market power – such as the power possessed by cable operators – it may even discourage the *development* of innovative, independent content.

**I. THE COMMISSION SHOULD ADOPT OPEN ACCESS REQUIREMENTS THAT PROHIBIT DISCRIMINATION AGAINST ANY UNAFFILIATED CONTENT OR SERVICE PROVIDER.**

**A. Open Access Requirements Are Needed To Prevent Cable Operators From Discriminating Against Independent Content and Service Providers.**

In the *NOI*, the Commission observes that “there is no universally accepted definition of ‘open access’” and proposes three possible models, all of which relate to the terms by which ISPs should be granted access to the cable modem platform.<sup>6</sup> The Commission goes on to ask “whether open access should be conceptualized according to any of these proposed models, or according to some other model.”<sup>7</sup> As noted above, MSTV believes that the Commission’s proposed models for open access are too narrow.

As the U.S. Court of Appeals for the D.C. Circuit recently observed, a cable operator has the “incentive to favor its affiliated programmers” and “may, as a rational profit-maximizer, compromise the consumers’ interests.”<sup>8</sup> Over and over, cable operators have exercised their bottleneck control to deny consumers access to the content and services provided by broadcasters and other unaffiliated entities. It was this conduct that led Congress to impose

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<sup>5</sup> By contrast, open access requirements are both unnecessary and inappropriate for technologies, such as broadcast, where no single entity controls the flow of information that reaches the consumer’s home.

<sup>6</sup> See *NOI* at ¶¶ 27-31.

<sup>7</sup> See *id.* at ¶ 30.

mandatory cable carriage requirements in 1992.<sup>9</sup> More recently, Time Warner Cable violated the Communications Act and Commission rules by illegally removing the signals of ABC-owned television stations from its cable systems during the crucial “sweeps” period.<sup>10</sup> Time Warner Cable also has used its gatekeeper control to disable a competing EPG by searching out and stripping information from the free broadcast signal.<sup>11</sup> In so doing, the cable operator left its cable subscribers with no alternative to its cable-delivered EPG and reserved for itself the unfettered ability to favor its affiliated programming at the expense of broadcast or other unaffiliated content.<sup>12</sup>

Cable operators now are extending their anticompetitive conduct into the digital environment, where they have demanded retransmission consent language that would restrict the delivery of free digital services and enhancements to consumers, allowing the cable systems to

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<sup>8</sup> *Time Warner Entertainment Co., L.P. v. U.S.*, 211 F.3d 1313, 1322 (D.C. Cir. 2000).

<sup>9</sup> Based on a history of anticompetitive conduct, Congress was concerned that cable operators had both the opportunity and incentive to engage in anticompetitive behavior that would deprive local broadcasters of access to cable subscribers. *See, e.g.*, Cable Television and Consumer Protection and Competition Act of 1992, S. Rep. No. 92, 102d Cong., 2d Sess. 45 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1178.

<sup>10</sup> *See* Memorandum Opinion and Order, *Time Warner Cable; Emergency Petition of ABC, Inc. for Declaratory Ruling and Enforcement Order for Violation of Section 76.58 of the Commission's Rules, or in the Alternative for Immediate Injunctive Relief*, 15 FCC Rcd 7882 (rel. May 3, 2000).

<sup>11</sup> *See* Petition for Special Relief of Gemstar International Group, Ltd. and Gemstar Development Corp. for Enforcement of the Communications Act of 1934, as Amended, and the Commission's Must Carry Rules, CSR 5528-Z (filed Mar. 16, 2000, Public Notice Mar. 24, 2000).

<sup>12</sup> After Time Warner Cable's anticompetitive conduct came under close scrutiny in the context of the proposed merger with AOL, it discontinued stripping this EPG data on its cable systems. However, it continues to maintain that it has the legal right to strip out this information, and there is no assurance that it will not resume this conduct if the merger is approved without conditions preventing this activity. *See* Comments of Gemstar-TV Guide International, Inc. and Gemstar Development Corp., *Implementation of Section 304 of the Telecommunications Act of 1996*, (continued...)

block, strip or otherwise disable programming, independent EPG data, and other free services carried in broadcasters' DTV signals.<sup>13</sup> For more than three years, the public has waited for the cable industry to come to agreement with equipment manufacturers as to the standards that will permit the seamless transmission of EPG and other content, but those standards (in the form of build-to specifications) are still elusive.<sup>14</sup> Similarly, cable operators have failed to provide equipment manufacturers with the technical specifications needed to allow consumers to connect unaffiliated navigation devices to the cable network, notwithstanding a Commission mandate to open the market to competing navigation devices by July 1, 2000.<sup>15</sup> In these respects, cable

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*Commercial Availability of Navigation Devices*, CS Docket No. 97-80 (rel. Sept. 18, 2000) at 4 n.8.

<sup>13</sup> See, e.g., Letter from Stephen A. Weiswasser, Executive Vice President and General Counsel, Gemstar Development Corp., to William E. Kennard, Chairman, FCC, *Ex Parte Presentation*, CS Docket No. 98-120 and CSR 5528-Z (April 26, 2000); Response of the Association for Maximum Service Television, Inc. in Support of Imposing Conditions on AOL/Time Warner, *Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control*, CS Docket No. 00-30 (May 11, 2000) at 2-3.

<sup>14</sup> See, e.g., Comments of the National Association of Broadcasters and the Association for Maximum Service Television, Inc., *Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67 (May 24, 2000); *Broadcasters Biennial Review Comments* at 25-30. For example, it is still unsettled how PSIP (Program and System Information Protocol) data carried on a DTV signal will be transmitted through the cable plant. PSIP allows the delivery through the DTV signal of tuning and program schedule information to support basic navigation and on-screen program guides for consumers. The February 2000 agreement between the Consumer Electronics Association and the National Cable Television Association purported to provide technical specifications for PSIP, but failed to specify the technical standards in enough detail to ensure that PSIP data will be seamlessly transmitted through the cable infrastructure to PSIP-equipped consumer devices.

<sup>15</sup> See Further Notice of Proposed Rule Making and Declaratory Ruling, *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80 (rel. Sept. 18, 2000) ¶ 7 (noting continuing disputes between cable operators and equipment manufacturers as to the progress made towards developing a market for independent navigation devices). The Commission recently noted that while the cable industry claims to have made digital separate security modules available for customers by July 1, 2000, and to have made build-to specifications available that would allow manufacturers of independent set-top boxes to manufacture and market host devices, the Consumer Electronics (continued...)



operators have perpetuated their control over the pathway into consumers' homes by asserting the right to block unaffiliated digital services and ensuring that cable subscribers cannot access cable services without a cable-provided set-top box. Without open access requirements that prohibit cable operators from discriminating against or blocking broadcast programming, broadcast-delivered services, and other unaffiliated content and services, such anticompetitive and anti-consumer conduct can only be expected to grow, depriving the public of competitive options and stunting the proliferation of independent digital services.

The Commission has ample evidence in the records of several proceedings that demonstrate the present need for open access requirements that broadly prohibit discrimination by cable operators against unaffiliated content and services, particularly those provided by broadcasters through the analog and digital television spectrum.<sup>16</sup> MSTV hereby incorporates

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Retailer Coalition ("CERC") maintains that "the cable industry failed to provide technical specifications for interactive and non-interactive OpenCable host devices in time to support competitive entry by July 1, 2000." *Id.* The Commission further noted that "CERC states that as of August 2, 2000 there still is no interactive specification available." *Id.* at 3 n.14. *See also* Reply Comments of the National Association of Broadcasters and the Association for Maximum Service Television, Inc., *Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67 (June 8, 2000) at 9-10 (explaining that "[t]here is now in the record compelling evidence that the cable industry in particular is frustrating the development of a truly competitive market in navigation devices"); Letter from Victor Tawil, Senior Vice President, MSTV, to William E. Kennard, Chairman, FCC (September 16, 1998) (highlighting cable industry's role in hampering development of interoperability standards).

<sup>16</sup> *See Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120 ("DTV Cable Carriage Proceeding"); *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MM Docket No. 00-39; *Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control*, CS Docket No. 00-30; *Petition for Special Relief of Gemstar International Group, Ltd. and Gemstar Development Corp. for Enforcement of the Communications Act of 1934, as Amended, and the Commission's Must-Carry Rules*, CSR 5528-Z; *Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67; *Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, CS Docket No. 00-132. Evidence of cable operators' market power and anticompetitive conduct has been submitted in these proceedings by (continued...)

this evidence by reference into this pleading and requests that it be included in the record of this proceeding.

**B. The Commission's Model For Open Access Should Broadly Prohibit Discrimination Against Unaffiliated Content And Service Providers, Including Broadcasters.**

As the National Association of Broadcasters ("NAB") recently noted in an *ex parte* letter to Chairman Kennard, "the basic concept of 'open access' should apply to a variety of service and content providers, including, for example, instant messaging, electronic program guides, and digital and interactive television."<sup>17</sup> In this recent *ex parte* letter, the NAB urges the Commission to condition its approval of the proposed AOL and Time Warner ("TW") merger on compliance with this broader open access principle, which would "prohibit[] AOL/TW from blocking the access of unaffiliated content owners to consumers" or from "discriminating against unaffiliated content or service providers in any way."<sup>18</sup> The NAB explained:

Just as cable customers of AOL/TW should be permitted to choose their Internet provider freely, consumers should also be allowed the same freedom in selecting, for example, any analog, digital or interactive video programming, whether owned by an affiliated or unaffiliated content provider. NAB submits there is no reason to limit the benefits of an open access requirement to competing ISPs only, and not to competing providers of instant messaging, EPGs, video programming or other services.<sup>19</sup>

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broadcasters, equipment manufacturers and other providers of programming and services that compete with cable operators or their affiliates.

<sup>17</sup> Letter from Henry L. Baumann, Jack N. Goodman, and Jerianne Timmerman, National Association of Broadcasters, to William E. Kennard, Chairman, FCC, *Ex Parte Presentation*, CS Docket No. 00-30 (Oct. 2, 2000) at 1.

<sup>18</sup> *Id.* at 2.

<sup>19</sup> *Id.* See also Letter from Henry L. Baumann, Jack N. Goodman, and Jerianne Timmerman, National Association of Broadcasters, to William E. Kennard, Chairman, FCC, *Ex Parte Presentation*, CS Docket No. 00-30 (May 19, 2000) (strongly urging the Commission "to adopt a stringent 'nondiscrimination' condition preventing AOL/TW from utilizing their existing video (continued...)

Obviously, these freedoms should not be restricted to AOL/Time Warner subscribers, but should be afforded to all subscribers of cable operators or other MVPDs that exercise gatekeeper control over access to consumers' homes. In the *DTV Cable Carriage Proceeding*, MSTV has gone on record to explain that the existing law requires cable operators to carry all material provided for free through the broadcast digital signal.<sup>20</sup> Similarly, existing law requires cable operators to carry EPG data transmitted through the vertical blanking interval ("VBI") of analog broadcast signals because that data constitutes program-related information entitled to mandatory carriage under the Communications Act.<sup>21</sup> The concept of open access should of course protect delivery of these free, broadcast-delivered services, as required by the law, but also should go beyond that to ensure that providers of all independent content and services (including subscription services) are afforded access to consumers on nondiscriminatory terms.

Specifically, the Commission should release a Notice of Proposed Rulemaking ("NPRM") that proposes open access requirements that would prohibit cable operators (or other MVPDs with gatekeeper power) from discriminating against unaffiliated content and service providers by:

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distribution system (and their future digital broadband system) to discriminate against unaffiliated content providers in any way").

<sup>20</sup> See *MSTV DTV Carriage Comments*; *MSTV DTV Carriage Reply*.

<sup>21</sup> See Comments of the Association for Maximum Service Television, Inc., *Petition for Special Relief of Gemstar International Group, Ltd. and Gemstar Development Corp. for Enforcement of the Communications Act of 1934, as Amended, and the Commission's Must-Carry Rules*, CSR 5528-Z (Apr. 12, 2000).

- Discriminating in prices, terms and conditions in affording independent entities – including providers of EPGs, interactive television services, and other analog and digital television services – access to cable subscribers or the cable platform;<sup>22</sup>
- Discriminating on the basis of affiliation or non-affiliation (i) in affording access to cable subscribers and the cable platform and (ii) in establishing the prices, terms and conditions of such access;
- Interfering with a broadcaster's or other non-affiliated video service's ability to use part of its analog or digital channel capacity to provide EPGs, interactive services or other content or services to cable subscribers;
- Conditioning access to cable subscribers or the cable platform on the relinquishment of legal rights, such as the right to have all free digital content in a broadcaster's digital signal carried on the cable system or the right to have EPG information carried in the analog VBI;
- Conditioning access to cable subscribers or the cable platform on the removal of competing content or services from the broadcast analog or digital signal;
- Unreasonably refusing to grant access to cable subscribers or the cable platform to a class of content or service providers (*e.g.*, broadcasters) or refusing to negotiate in good faith with a particular content or service provider when the cable operator has granted access to that provider's competitor;
- Entering into exclusive arrangements with either affiliated or unaffiliated content and service providers that prevent competing providers from obtaining access to cable subscribers or the cable platform; and
- Engaging in any other conduct that unreasonably restrains the ability of an unaffiliated content or service provider to compete fairly (i) with respect to other services delivered to a subscriber's home by the cable provider or (ii) with respect to the market for such content and services generally.

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<sup>22</sup> This principle might be subject to exceptions similar to certain of the exceptions established in the context of the program access rules. Thus, while the proposed open access requirements would prohibit cable operators from discriminating against unaffiliated content and service providers to advance the competitive position of the cable operator or its affiliates or to advance the competitive position of one preferred entity over its competitors, it would not prohibit cable operators from imposing reasonable requirements for creditworthiness and financial stability or from establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of delivering the content or service to its subscribers.

These basic nondiscrimination principles are grounded in existing tenets of openness and nondiscrimination established by Congress and the Commission. The principles underlying MSTV's proposed open access model already are reflected in the program access rules,<sup>23</sup> the nondiscrimination rules for open video systems,<sup>24</sup> and the good faith negotiation requirements established by the Commission pursuant to the Satellite Home Viewer Improvement Act of 1999.<sup>25</sup> By issuing an NPRM that proposes a comprehensive open access model incorporating the principles proposed above, the Commission will remain true to its well-established commitment to openness and competition and will take an essential step towards assuring that consumers are afforded nondiscriminatory access to new, competitive content and services, whether those services are delivered by an affiliated or unaffiliated entity and whether they are delivered via the Internet or via the analog or digital broadcast spectrum.

## **II. OPEN ACCESS REQUIREMENTS SHOULD APPLY TO ENTITIES THAT SERVE AS GATEKEEPERS TO CONSUMERS' HOMES.**

In the *NOI*, the Commission observes that “[h]igh-speed services are provided using a variety of public and private networks that rely on different network architectures and transmission paths including wireline, wireless, satellite, broadcast, and unlicensed spectrum technologies.”<sup>26</sup> The Commission then asks whether the legal framework for open access in the cable context could “apply to other providers of high-speed services including those that employ wireless, satellite, broadcast and unlicensed spectrum technologies.”<sup>27</sup> Among other things, the

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<sup>23</sup> See 47 U.S.C. § 548; 47 C.F.R. §§ 76.1000-76.1003.

<sup>24</sup> See 47 U.S.C. § 573; 47 C.F.R. §§ 76.1503(a), 76.1504, 76.1507 and 76.1512.

<sup>25</sup> See 47 U.S.C. § 325(b)(3)(C); 47 C.F.R. § 76.65.

<sup>26</sup> *NOI* at ¶ 43.

<sup>27</sup> *Id.* at ¶ 44.

Commission asks whether “it [should] matter whether the provider has market power or is vertically integrated.”<sup>28</sup>

MSTV believes that platforms characterized by gatekeeper power – meaning the power to control access to a subscriber’s household – should be subject to open access requirements.<sup>29</sup> As noted above, cable’s role as a gatekeeper into the home is well established, as is the cable industry’s willingness to exercise this control to stamp out competing content and services. As consumers increasingly rely on a single entity to provide telephone, video programming, Internet and other services to the home, other platforms are developing the gatekeeper control traditionally held by cable operators. This growing power in many cases has been accompanied by growing vertical integration, increasing the incentives for these providers to block out unaffiliated content and services. Accordingly, open access requirements would serve the public interest and protect consumer access to a variety of new and innovative services wherever a single entity acts as a gatekeeper into the consumer’s home.

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<sup>28</sup> *Id.* The Commission also asks whether there are particular statutory or technological differences between different platforms that would justify different open access requirements. *See id.* at ¶¶ 44, 46. While such differences also may be relevant to the implementation of open access requirements, MSTV believes that the degree of gatekeeper control possessed by the content provider alone may be determinative.

<sup>29</sup> In *Turner Broadcasting System, Inc. v. FCC* (“*Turner I*”), the U.S. Supreme Court identified the threat to broadcast television posed by a cable operator’s “bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber’s home.” 512 U.S. 622, 656-57 (1994); *see also Time Warner Entertainment Co.*, 211 F.3d at 1317. The Court noted that “[t]he First Amendment’s command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.” *Turner I*, 512 U.S. at 657; *see also Time Warner Entertainment Co.*, 211 F.3d at 1318. The same principle supports the application of open access requirements to cable operators and other gatekeepers.

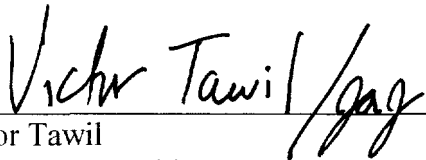
Thus, the nondiscrimination principles set forth above might properly be applied to DBS providers or other MVPDs that control access to their subscribers' homes, particularly where this control is coupled with vertical integration with content providers. Where gatekeeper power and vertical integration are combined with market power, as in the cable context, open access requirements are crucial. The need for open access in these circumstances has been conclusively demonstrated by cable operators who not only have exercised their bottleneck control to deprive their subscribers of content and services that compete with cable-provided content, but also have wielded their market power to threaten the development of new content and services altogether.

These features, which make open access so important, are conspicuously absent in the broadcast context. No single broadcast facility could *ever* control a viewer's access to the broadband platform. Unlike MVPDs, broadcasters distribute their signals for free to all viewers and exercise no control over the content and services distributed by competing broadcasters in the market. No broadcaster has the ability to restrict or otherwise interfere with any other broadcaster's or other entity's access to a consumer's home. This lack of gatekeeper control inherent in the broadcast service distinguishes it from the other technologies referenced above. Because broadcasters lack the capability to exercise gatekeeper power, they should not be subject to open access requirements. For the same reason, there are no circumstances under which broadcast capacity should be treated as or like a telecommunications service or facility.

### **III. CONCLUSION.**

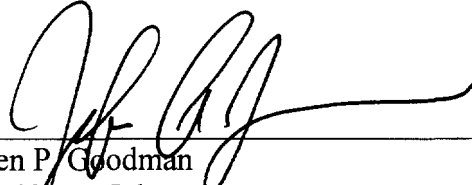
For the foregoing reasons, the Commission should adopt an approach to open access that would prohibit cable operators or other entities with gatekeeper power from discriminating against any unaffiliated content and service providers, including those that

provide EPGs, digital and interactive television, and other content and services through the analog or digital broadcast signal.



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December 1, 2000



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I hereby certify that the foregoing Comments of the Association for Maximum Service Television, Inc., have been served this first day of December, 2000, by hand delivery on the following:

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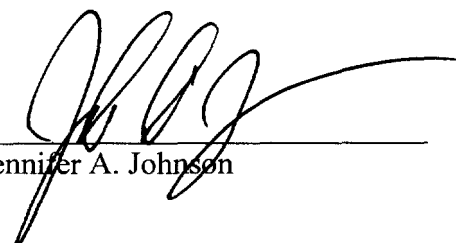
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